

AIR COMMAND AND STAFF COLLEGE

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**KELLY WHO?
REFRESHING THE JAG RECOLLECTION ON THE MEDIA,
THE AIR FORCE, AND THE FIRST COURT-MARTIAL OF
PUBLIC OPINION**

by

Jeffrey G. Palomino, Major, USAF

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Advisor: Karen S. Katzenbach

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On 21 May 1997 Air Force Chief of Staff Gen Ronald Fogelman testified before the Defense Subcommittee of the Senate Armed Services Committee. A tough, no nonsense fighter pilot, General Fogelman had become the chief three years earlier with the charge to restore accountability to an Air Force that had lost sight of its core values.¹ The scheduled testimony was the budget and the impact to the Air Force of the recently published Quadrennial Defense Review.² When the time came for Sen. Tom Harkin (D-Iowa) questions the hearing took a decided turn.³ Senator Harkin didn't ask about the F-22, the Joint Strike Fighter, or base realignment and closure, but about a court-martial at Minot AFB, North Dakota. He wanted to know about the Kelly Flinn case. With a basis of knowledge admittedly informed by media coverage, Senator Harkin expressed indignation.⁴ "General," he said, "How many attorneys do you have in the Air Force running around trying to find out how many people are committing adultery?"⁵

The case against 1st Lt Kelly Flinn formally began with preferral of four charges on 28 January 1997.⁶ What was unique about the case and what makes it seminal in Air Force history was the media blitz that followed the charges, paralyzed the Pentagon, and persuaded the Secretary of the Air Force to give Flinn a general, under honorable conditions administrative discharge in lieu of a court-martial.⁷ In *United States v. Flinn* the Air Force was "out-flanked" by strategic media campaign that radically shifted public opinion against the Air Force.⁸ Flinn's "brilliantly innovative public defense" was the first of its kind in the Air Force.⁹ Unfortunately, this landmark case sits outside the corporate memory of most Judge Advocates. This paper seeks to refresh that memory. It discusses the basic facts of the case, highlights the defense media plan and corresponding Air Force response, and concludes with lessons for current Staff Judge Advocates (SJAs).

The facts of Flinn's case are straightforward. Flinn graduated from the Air Force Academy, finished at the top of her class in B-52 flight training, and appeared in Air Force promotional videos.¹⁰ Assigned to Minot in the fall of 1995, she was the first female B-52 pilot in the Air Force. In June 1996 the Air Force selected her to fly the Secretary of the Air Force Sheila Widnall in a B-52 demonstration flight.¹¹ That same month Flinn had sex on two occasions with an enlisted man at Minot.¹² In July she began a sexual relationship with Marc Zigo, someone she knew was the husband of an airman basic assigned to Minot.¹³ Months later Flinn lied to investigators under oath about the Zigo affair.¹⁴ She later violated her commander's order to have no contact with Zigo.¹⁵

After preferral and the Article 32 hearing, the Flinn family hired attorney Frank Spinner. A retired Air Force Judge Advocate, Spinner had achieved notoriety as civilian attorney for his defense of Aberdeen Proving Grounds Drill Sergeant Delmar Simpson and Air Force Capt Jim Wang.¹⁶ Spinner started receiving media inquiries before he even traveled to Minot to meet Flinn.¹⁷ His first task was to ask the Eighth Air Force commander to give Flinn an Article 15.¹⁸ Spinner told the commander of the burgeoning media interest.¹⁹ He advised the commander that "no one could predict how it would turn out."²⁰ This was not a threat, but something Spinner felt the convening authority should consider.²¹ The request for nonjudicial punishment was denied, and all charges were referred on 26 February 1997.²² A few days before referral, the Air Force issued the first press release of the case.²³ Flinn read articles about her adultery in the *St. Louis Post-Dispatch* and saw a similar story on *CNN Headline News*.²⁴ Although ethically tight, the release contained factual errors which enraged Flinn and motivated the defense.²⁵

The defense media campaign had one strategic goal "to posture the case to get a resolution outside of court."²⁶ To reach this the defense worked along three lines of operation.

First, the defense decided to arrange media stories to hit around the same time, one to two weeks before the scheduled 20 May 1997 court-martial date.²⁷ The idea was to do a “frontal assault on the Air Force” with the shots coming so fast the “Air Force would not know what hit them.”²⁸ Spinner knew this timing would render the Air Force unable to respond.²⁹ Second, the defense wanted to get the story to as many media outlets as possible. Spinner was helped by the fact that the Flinn family was well connected, and an uncle in the family had appeared on *60 Minutes* before.³⁰ Through this the defense made contact with the show’s producers and arranged Flinn’s 11 May 1997 appearance.³¹ The defense followed up the *60 Minutes* segment with Monday morning talk show interviews with Flinn family members.³² The defense surrounded this coverage with sympathetic stories in *The Washington Post*, *the New York Times*, and *USA Today*. This was “target marketing” of the legislative audience, a liberal demographic, and the business traveler market.³³ Third, the defense reset its own message, which it framed through the adultery charge.³⁴ The message was Flinn was an innocent victim who had made naïve mistakes of the heart. Now, “this pioneer was being persecuted by an Air Force of old men applying old men’s morals on a new generation.”³⁵

The defense media assault blindsided the Air Force. Although it had media plan for the case, “much of it centered on providing information as the case unfolded judicially.”³⁶ When the case began to unfold in outside the courtroom the Air Force clammed up and stiff-armed reporters with “no comment.” This “left a news vacuum that the Flinns were only too happy to fill” and the Air Force image took a beating.³⁷ Later, when the Air Force finally did choose to say something, it badly misstepped.³⁸ This added to the perception that the Air Force was mistreating Flinn. Ultimately, the defense’s plan achieved the desired end state. Flinn’s discharge was approved on 22 May 1997.

The *Flinn* case leaves lessons for SJAs today. First, SJAs must aggressively anticipate media interest in military justice cases and other legal issues. This is true even more today than it was in 1997.³⁹ The media today runs at an accelerated pace.⁴⁰ Created by a reliance on the Internet, the surplus of media outlets, and advancement in technology this frantic pace not only speeds up reporting of the news, but also how quickly the public forms opinions to news.⁴¹ Added to this mix are social media such as *Twitter*, *Facebook*, and blogs that effectively leave “no secrets.”⁴² To operate in this environment SJAs must identify media worthy cases early. Key factors to consider include immediacy of the issue, proximity, prominence of the accused, oddity, conflict, suspense, emotional appeal of the case, and sex or scandal.⁴³

The second lesson is that legal offices must put together a media plan early that can respond to wrong or misleading information if forced to.⁴⁴ This should be done parallel to and with the same emphasis as trial counsel’s preparation of the case. Do not assume that if the Air Force says nothing or does not cooperate that the story will go away.⁴⁵ In 2008 lecture at the Air War College *60 Minutes* correspondent Scott Pelley reminded, “There’s an immutable law of the universe and that is that every *60 Minutes* story is 12 minutes long. If the Air Force, the Army, the Department of Defense won’t speak to me and present its side of the story, the story’s still going to be 12 minutes long.”⁴⁶ Certainly, the best position is for SJAs to plan their own information operation early.

A third lesson related to early planning is for SJAs to “get to know Public Affairs before a crisis happens.”⁴⁷ PA is specially trained to work with the media, has an extensive knowledge of how the media operates, and can provide media training should comments be requested. A strong relationship also allows SJAs to give PA “Military Justice 101.”⁴⁸ SJAs can also educate

PA on the military justice system, its basic procedures, and its fundamental fairness. This ensures unity of effort when crisis erupts.

The final lesson relates to charging. In *Flinn*, most agree that the adultery charge was a “‘trailer offense’.”⁴⁹ The charge was less serious “both in terms of authorized punishment and also in terms of breach of standards involved.”⁵⁰ Notably, it was that charge that became “the lightning rod” of the case.⁵¹ “The most visible reaction from the civilian community focused on the adultery charge.”⁵² All of this begs the question of whether or not it should have been added at all. Here, *Flinn* proves that choosing to charge everything a creative Chief of Military Justice can think of can be fatal. Instead, SJAs should charge only “the gravamen of the offense . . . what it is that got you angry about the case, and not the extraneous stuff.”⁵³

In conclusion, the *Flinn* case offers a ground breaking view of the strategic use of the media as a tool of advocacy. Before *Flinn* no Air Force accused had ever made such a strong challenge to the system in the public arena.⁵⁴ As a result many more do today and, correspondingly, the Air Force is now generally better positioned to respond. Ultimately, the Air Force did finally respond well in the *Flinn* case. At that same Senate hearing General Fogelman offered this superb sound-bite: “I think that in the end, this is not an issue of adultery. This is an issue about an offer who was entrusted to fly nuclear weapons, who disobeyed an order, who lied – that’s what this is about.”⁵⁵ To be certain, that was what the Kelly Flinn case was about. Unfortunately that message was eclipsed by a savvy media campaign that had already received a verdict of not guilty in the court of public opinion.

¹ Dr. Richard H. Kohn, ed., “The Early Retirement of Gen Ronald R. Fogelman, Chief of Staff, United States Air Force,” *Aerospace Power Journal*, Spring 2001, 10. Gen Fogelman’s full comments were as follows: “When I became the chief, I received a number of letters from people like you who essentially said that they thought the chief needed to restore the soul of the Air Force. That caught me somewhat by surprise because I was not sure exactly what the soul of the Air Force was, or what was required to fix it. But my conclusion was that somehow we had found ourselves, or allowed ourselves, through a series of decisions and actions, to lose sight of our values. The

trouble came not from some overriding set of principles, but more from employing situational ethics (i.e., cronyism and other things) that made it seem as though the institution lacked integrity. So in the back of my mind, there seemed to be a necessity, or change if you will, to work this issue on my watch.” Ibid., 10. Notably, he gave this comment after his resignation and in response to Dr. Kohn’s question, “General Fogelman, why did you decide to ask for early retirement.” Ibid.

² Senate, *Hearing of the Defense Subcommittee of the Senate Armed Services Committee, FY 98 Defense Appropriations*, 105th Cong., 1st sess., 21 May 1997, 1.

³ Ibid., 25.

⁴ Ibid.

⁵ Ibid.

⁶ Colonel Jack L. Rives, “The Case Against Lieutenant Kelly Flinn,” *The Reporter*, 24, no. 4 (December 1997): 6. The charges were fraternization (i.e., Flinn had a sexual relationship with a single enlisted man), adultery with an enlisted airman’s husband, false official statement, and violation of her commander’s no-contact order. Most would agree that the charges were hardly unique to the military justice system nor are they unique now. Lieutenant General (Retired) Jack L. Rives, Former Judge Advocate General of the Air Force, interviewed by author, 16 March 2010.

⁷ Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (MOAA), interviewed by author, 10 March 2010.

⁸ Rives, “The Case Against Lieutenant Kelly Flinn,” 5.

⁹ Colonel James W. Swanson, “Military Justice Under Scrutiny: Exploring the Conflict Between Society’s Norms and the Military’s Needs,” *The Reporter*, 25, no. 2 (June 1998): 3.

¹⁰ Dr. James H. Toner, “Temperance and the Profession of Arms) (paper presented at the Joint Services Conference on Ethics, 28-29 January 1999), 11.

¹¹ Kelly Flinn, *Proud to Be* (New York, N.Y.: Random House, 1997), 152-154.

¹² Rives, “The Case Against Lieutenant Kelly Flinn,” 5-6.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid., 5-6. By this time Flinn was living with Zigo off base, an arrangement that continued for approximately five more weeks after the no contact order. Ibid.

¹⁶ Flinn, 210. Capt Want was the AWACS crew member acquitted in the Blackhawk shoot down case. Ibid. Notably, each of those clients had appeared on major network news programs. Frank Spinner, Defense Counsel, interviewed by author 16 March 2010.

¹⁷ Frank Spinner, Defense Counsel, interviewed by author 16 March 2010.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Flinn, 218.

²³ Ibid., 212.

²⁴ Ibid.

²⁵ Ibid., 212-218. The factual errors in the Air Force press release related to the charges. According to Flinn, “The charges were all wrong: CNN was saying that I’d had an affair with a married enlisted man.” Flinn also took issue with the fact that neither she nor her squadron commander was told of the press release. Ibid., 212.

²⁶ Frank Spinner, Defense Counsel, interviewed by author 16 March 2010.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (MOAA), interviewed by author, 10 March 2010.

³⁶ Colonel Jack L. Rives, "Who You Gonna Call? AFPAZ! An Overview of the Air Force Executive Issues Team," *The Reporter*, 26, no. 4 (December 1999): 19.

³⁷ Tony Capaccio, "The Kelly Flinn Spin Patrol," *American Journalism Review*, September 1997, n.p., on-line, Internet, 26 January 2010, available from <http://www.ajr.org/Article.asp?id=2258>.

³⁸ Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (MOAA), interviewed by author, 10 March 2010. The best example of this is the official Air Force response given during the *60 Minutes* piece. The person chosen to respond was Col Bob Reed, a judge advocate in charge of the Air Force's military justice division. Unfortunately, the Air Force put so many constraints on Colonel Reed that he ended up looking ill-prepared and evasive in response to Safer's questions relentless questioning. Ibid.

³⁹ Colonel Morris D. Davis, "Effective Engagement in the Public Opinion Arena: A Leadership Imperative in the Information Age," *Air & Space Power Chronicles Online Journal*, n.p., on-line, Internet, 5 November 2004, available from <http://www.airpower.maxwell.af.mil/airchronicles/cc/davis1.html>.

⁴⁰ Philip Seib, *Beyond the Front Lines* (New York, N.Y.: Palgrave MacMillan, 2004), 12.

⁴¹ Ibid.

⁴² Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (MOAA), interviewed by author, 10 March 2010. One can only imagine what a "Kelly Flinn Blog" would have looked like. Use of media such as this should be considered a given in today's environment.

⁴³ US Air Force Public Affairs Center of Excellence, *Meeting the Media: A Pocket guide to assist Airmen in communicating with the news media* (Maxwell AFB, AL, 2008), 15-16. Most journalists agree these factors are key the elements of "news." Immediacy is defined as something that has just happened or is about to happen. Proximity means the closer to "home" the better. A prominent case involves public figures, elected officials, famous persons. Oddity is something bizarre, unusual or unexpected. A case with conflict involves one with arguments, debates, or situations where there is a winner and loser. A suspenseful case is one when the outcome cannot be foreseen. An emotional case is one where situations that stir up sympathy, anger or other emotions. Finally a case of sex or scandal is almost always newsworthy because in appropriate behavior sells media. Ibid.

⁴⁴ Lieutenant General (Retired) Jack L. Rives, Former Judge Advocate General of the Air Force, interviewed by author, 16 March 2010.

⁴⁵ Scott Pelley, National Security Forum, lecture, Air War College, Maxwell AFB, AL, 13 May 2008.

⁴⁶ Ibid. To these comments Pelley added, "The military and journalism are similar in at least one – in many respects – but one of those respects is we're very mission oriented in journalism . . . and my boss does not want to hear about mission failure. We are not going to fail. We are going to get the story." Ibid.

⁴⁷ Lieutenant General (Retired) Jack L. Rives, Former Judge Advocate General of the Air Force, interviewed by author, 16 March 2010.

⁴⁸ Ibid.

⁴⁹ Colonel Jack L. Rives, "The Case Against Lieutenant Kelly Flinn," *The Reporter*, 24, no. 4 (December 1997): 6.

⁵⁰ Ibid.

⁵¹ Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (MOAA), interviewed by author, 10 March 2010.

⁵² Kingsley R. Brown, "Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse Than The Disease," *Duke Journal of General Law & Policy* 14 (2007): 773.

⁵³ Brigadier General (Retired) James W. Swanson, General Counsel & Corporate Secretary, Military Officers Association of America (MOAA), interviewed by author, 10 March 2010.

⁵⁴ Frank Spinner, Defense Counsel, interviewed by author 16 March 2010.

⁵⁵ Senate, *Hearing of the Defense Subcommittee of the Senate Armed Services Committee, FY 98 Defense Appropriations*, 105th Cong., 1st sess., 21 May 1997, 25.

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